ORIGINAL

MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO PC

Washington
Boston
New York
Reston

EX PARTE OR LATE FILED

701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
202 434 7300
202 434 7400 fax
www.mintz.com

James L. Casserly
Direct dial 202 661 8749
jlcasserly@mintz.com

March 3, 2000

PUBLIC VERSION

RECEIVED
MAR - 3 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Ex parte - CC Docket No. 00-4
In the Matter of Application of SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Texas

Dear Ms. Salas:

Our client, AT&T Corp. ("AT&T"), wishes to respond to several assertions made for the first time in SBC's reply comments regarding the offering by CLECs of voice and xDSL service over an unbundled loop obtained from SBC. These assertions, which bear on critical issues in this proceeding, are false and misleading, as demonstrated by other portions of SBC's reply as well as recent events in Texas. This letter also responds to new arguments presented by SBC regarding its "separate affiliate" and explains why SBC's reliance on the SBC/Ameritech merger conditions is irrelevant to a 271 application.

Combining xDSL with UNE-P

In its initial comments, AT&T demonstrated that SBC was violating its nondiscrimination obligations by refusing to implement measures that would enable AT&T, either by itself or in conjunction with another carrier, to provide voice and xDSL service over a single line. In its reply comments, SBC acknowledges, for the first time, that CLECs have a right to do just that. Specifically, in attempting to explain its dilatory provisioning of xDSL capable loops, SBC states (at 25 n.11) that, "if CLECs chose to offer voice services, they could share the voice line in precisely the same way as SBC." SBC then blames its deficient performance on CLECs, claiming (id.) that "they don't want to offer voice service; they just want to share SBC's voice channel."

No. of Copies rec'd 0+1
List ABCDE

PUBLIC VERSION

SBC's statement that CLECs "don't want to offer" voice and data service is patently false. It is refuted not only by AT&T's comments and declarations, but elsewhere by SBC itself. Acknowledging the concerns raised by AT&T, and purporting to address them, SBC assures the Commission (at 37 n.19) that "AT&T is free to offer both voice and data service over the UNE-Platform or other UNE arrangements, whether by itself or in conjunction with an xDSL partner." To the contrary, although AT&T wishes -- and needs -- to "offer both voice and data services over the UNE Platform," SBC has made it impossible for AT&T to do so in an efficient, prompt, and non-disruptive manner. Thus, it is SBC's refusal to allow AT&T "to share the voice line in precisely the same way as SBC," and not CLEC business plans, that explains the absence of combined xDSL/voice competition in Texas today.

But SBC is not merely being intransigent; it is also misrepresenting its position to the Commission.[1] Specifically, as explained in the attached Declaration of Michelle Bourianoff,

AT&T's latest experiences in attempting to obtain nondiscriminatory access to provide xDSL service in Texas are disturbingly reminiscent of its experience in attempting to obtain nondiscriminatory access in order to provide competing voice service using UNE-P. SBC first interposes an array of legal objections (*e.g.*, objections to combining elements, resistance to TELRIC pricing), which delay and increase the costs of competitive entry. When those legal barriers are finally removed, SBC then raises successive layers of technical and operational barriers and objections.

At the same time, SBC has been accelerating its deployment of "Project Pronto," with the avowed objective of being the "only" carrier in Texas capable of offering voice and data service over the same line. The stonewalling of AT&T and other CLECs is just as much a part of SBC's strategy as is its own deployment. See Pfau/Chambers Decl. at ¶¶ 6-61. The record is clear that

[1] Sad to say, such conduct is not aberrational for SBC. Just as it previously represented to Congress that it could lawfully transfer from the courts to the Commission the prohibition on RBOC provision of interLATA service, only to later pursue a lawsuit challenging the constitutionality of that very action, SBC is representing one thing to the Commission about xDSL, while telling CLECs exactly the opposite.

SBC voice customers who wish to add SBC's xDSL service need not order a second line, transition their voice service from the first to the second line, or incur all the attendant costs and risks of service disruption. At the same time, the record also shows that would-be customers of AT&T cannot obtain voice and xDSL services without incurring these costs and risks. Putting aside all the problems with converting SBC's local voice service customers to an AT&T service provided through the UNE Platform, there is in Texas simply no established mechanism -- none -- for AT&T to add an xDSL capability to the services it provides via UNE-P. *A fortiori*, there is no manner in which AT&T can procure from SBC the processes, procedures, and mechanisms needed to add xDSL capability as swiftly, seamlessly, reliably, and economically as when SBC adds this capability for its own customers.

This is not what the statute means by "nondiscriminatory." This is not "parity. This is not "full implementation." This is not checklist compliance.[2]

Reliance on the "Separate Affiliate"

With respect to the proposed "separate affiliate" for advanced services, AT&T has already addressed most of SBC's arguments fully in comments filed on January 31 and reply comments filed February 22. But SBC offers two new arguments on reply that require a response.

First, SBC claims that comments directed to the shortcomings of SBC's proposed separate affiliate constitute a "collateral attack on the New York Order." SBC Reply at 36. This is absurd. The Commission in that order expressly disclaimed reliance on Bell Atlantic's separate affiliate proposal (New York Order at ¶ 39). That proposal had been presented extremely late in the 90-day 271 process; the Department of Justice was afforded no opportunity to comment; and the final text of the order -- released just three business days after other parties filed their comments on the subject -- contained not one single citation to any of the comments that explored, in detail, the many deficiencies of Bell Atlantic's proposal. Under the circumstances, and particularly in light of its statements that it did not rely on the proposal, the Commission's other statements about it have little if any precedential value.

Second, SBC's main response to the observations of multiple parties that its separate affiliate is not "fully operational" is that SBC is "six months ahead of Bell Atlantic" (SBC Reply at 37). But that is not the test – even under the language of the New York Order upon which SBC relies. SBC's affiliate is not "fully operational" today, and it will remain far less than truly separate during a transitional period that still has some months to run (*see, e.g.,* SBC Ramsey Reply Aff. at ¶ 4).

---

[2] Nor does it advance the statutory goal of broad, competitive deployment of advanced services.

Further, as the Commission noted in the SBC/Ameritech Merger Order, the separate affiliate requirements were designed solely for purposes of the merger. The Commission was emphatic on this point. In adopting the merger conditions, the Commission emphasized that its action was not intended to -- and did not -- constitute "an interpretation of [SBC's legal obligations under] the Communications Act, especially Sections 251, 252, 271, and 272 of the Commission's rules . . . ."[3] Thus, no interpretation, modification, or waiver of the merger conditions can alter SBC's legal obligations under those statutory provisions.[4] Nor should any interpretation, modification, or waiver be considered without evaluating its impact on SBC's ability to meet its statutory duties. If a conflict arises between Section 251 or another statutory provision and the merger conditions, it is the law -- not the merger conditions – that is paramount.

The central problem that SBC overlooks is that the *statute* requires nondiscrimination, while the *merger conditions* permit discrimination. This is most vividly demonstrated by the Reply Affidavit of Ms. Ramsey (at ¶ 7):

> No SBC ILEC will discriminate in favor of ASI in the procurement of goods, services, facilities or information, or in the establishment of standards *except to the extent authorized by the Merger Conditions*. To the extent SBC ILECs plan, develop, or design new services for or with ASI, they will also plan, develop, or design new services with other entities on a nondiscriminatory basis *unless a Merger Conditions exception applies* . . . . The SBC ILECs will not discriminate between ASI and unaffiliated entities with regard to any goods, services, or non-public information relating to exchange access service *unless a Merger Conditions exception applies* . . . . With *the exception of certain Advanced services equipment covered by the Merger Conditions*, the SBC ILECs will provide interLATA or intraLATA facilities to nonaffiliated entities on a nondiscriminatory basis.

Thus, the most SBC can say is that it is complying with merger conditions that specifically contemplate various forms of discrimination, conditions that the Commission unequivocally stated do not constitute a determination with regard to what is required by

---

[3] SBC/Ameritech Merger Order ¶ 357; see id. ¶¶ 356, 511. The conditions represent "a floor and not a ceiling." Id. ¶ 356. They "address potential public interest harms specific to the merger, not the general obligations of incumbent LECs or the criteria for BOC entry into the interLATA market." Id. ¶ 357.

[4] The Commission must be "especially" careful not to rely on the SBC/Ameritech merger conditions to define SBC's nondiscrimination obligations under Section 251 and Section 271 of the Act. See id. ¶ 357. Indeed, the merger conditions "tail" may not and should not be permitted to wag the statutory "dog."

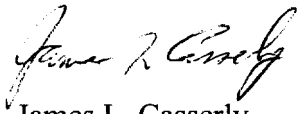
Sections 251 and 271 (both of which call for "nondiscriminatory" treatment of requesting carriers). Whether or not SBC complies with the merger conditions is certainly a worthy subject for an enforcement proceeding, but it is simply irrelevant to checklist compliance in connection with a Section 271 application.

Conclusion

Section 271 applicants are required to prove their case in their initial applications, not subsequently. But here the new additions to the record merely confirm what has been apparent all along: SBC's showing on xDSL matters is wholly inadequate to demonstrate compliance with the competitive checklist. Only a decisive rejection for these failures can create the necessary incentives (as specifically contemplated by Congress) for SBC to remedy these deficiencies.

Please place a copy of this correspondence in the record of this proceeding. Two copies of this Notice are being submitted to the Secretary of the Commission in accordance with Section 1.1206(b)(2) of the Commission's Rules.

Sincerely,



James L. Casserly
Counsel for AT&T Corp.

Attachment

cc: Ms. Kathryn Brown
Ms. Dorothy Attwood
Mr. Jordan Goldstein
Ms. Rebecca Beynon
Mr. Kyle Dixon
Ms. Sarah Whitesell
Mr. Larry Strickling
Mr. Robert Atkinson
Ms. Michele Carey
Mr. Chris Wright
Mr. Jon Nuechterlien
Ms. Debra Weiner

DCDOCS:167142.1(3KY%01!.DOC)